UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

OHIOANS AGAINST CORPORATE BAILOUTS, LLC, et. al.,	:	
Plaintiffs,	:	**Case No. 2:19-cv-4466**
vs.	:	**Judge Edmund A. Sargus, Jr.**
FRANK LaROSE, as OHIO SECRETARY OF STATE, et. al.,	:	
Defendants.	:	

MOTION OF FIRSTENERGY SOLUTIONS CORP. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

FirstEnergy Solutions Corp. ("FES") respectfully moves for leave to file an *Amicus* Brief in this case to apprise the Court of two fundamental grounds for denying Plaintiffs' motion for temporary restraining order (ECF No. 2), which may not be covered in the briefing by the parties.

FES has an important interest in the outcome of this case, as it is the owner of the Davis-Besse Nuclear Power Station located east of Toledo, Ohio, and the Perry Nuclear Power Plant located northeast of Cleveland in North Perry, Ohio. Plaintiffs concede in their motion that FES is eligible to receive funds derived from the new "charges" imposed by Amended Substitute House Bill No. 6 ("H.B. 6") on Ohio's retail electric customers. [ECF No. 2, at PageID #41]

In addition, the outcome of FES' pending action in the Ohio Supreme Court will have a significant impact on the instant action – and, indeed, will likely render Plaintiffs' claims and requested injunctive relief moot. On September 4, 2019, FES filed an original action in the Ohio Supreme Court, captioned *FirstEnergy Solutions Corp. v. Ohioans Against Corporate Bailouts*, Case No. 2019-1220 (the "Ohio Supreme Court Action"), challenging Plaintiffs' referendum

petition on H.B. 6. Under Article II, § 1d of the Ohio Constitution, "[l]aws providing for tax levies … shall not be subject to the referendum." The state law issue presently before the Ohio Supreme Court is **whether H.B. 6 is even subject to a referendum under the Ohio Constitution**. Plaintiffs' entire case before this Court is premised on their supposed right of referendum on H.B. 6, but the Ohio Supreme Court has exclusive jurisdiction to decide this threshold legal issue.

For these reasons, FES requests leave to file the *Amicus* Brief attached as Exhibit A, which FES submits is timely, useful, and necessary to the proper administration of justice in this case. The further grounds supporting this motion are set forth in the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

"Classical participation as an *amicus* to brief and argue as a friend of the court was, and continues to be, a privilege within the sound discretion of the courts, depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice." *Ball v. Kasich*, 2017 U.S. Dist. LEXIS 116145, *24 (S.D. Ohio, July 25, 2017) (Sargus, J.) (granting motion to file *amicus* brief). "Granting leave to appear as an *amicus* is appropriate when a party has an important interest and a valuable perspective on the issues presented." *Board of Educ. v. United States Dep't of Educ.*, 2016 U.S. Dist. LEXIS 107614, at *17 (S.D. Ohio, Aug. 15, 2016) (Marbley, J.) (granting motion to file *amicus* brief).

FirstEnergy Solutions Corp. ("FES") respectfully submits that it satisfies this standard and thus should be permitted to file the *Amicus* Brief that it is submitting for the Court's consideration. Plaintiffs concede that FES has a substantial interest in the outcome of this litigation. Furthermore, the *Amicus* Brief offered by FES is undoubtedly timely (submitted before Defendants' briefing is due), and will provide useful information to the Court that is necessary to the administration of justice in this case. Specifically, FES' proposed *Amicus* Brief presents this Court with information about its pending Ohio Supreme Court action that will render moot, or at the very least materially alter resolution of, this present action. In addition, FES' proposed *Amicus* Brief provides prior sworn testimony from Plaintiff Brandon Lynaugh that directly contradicts Plaintiffs' claims and their supposed basis for seeking injunctive relief.

Where, as here, a proposed *amicus* brief is timely, useful, or otherwise necessary to the administration of justice, this Court has consistently granted leave to file an *amicus* brief. *Ohio v. United States EPA*, 2019 U.S. Dist. LEXIS 50603, *3 (S.D. Ohio, March 26, 2019) (Sargus, J.); *Shreve v. Franklin County*, 2010 U.S. Dist. LEXIS 131911, *4-5 (S.D. Ohio, Dec. 14, 2010)

(Sargus, J.); *United States v. Ohio Edison Co.*, 2003 U.S. Dist. LEXIS 25464, *57-58 (S.D. Ohio, Jan. 22, 2003) (Sargus, J.).

For these reasons, FES respectfully requests leave to file its *Amicus* Brief.

Respectfully submitted,

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1207-001:833226

EXHIBIT

A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

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Plaintiffs,	:	**Case No. 2:19-cv-4466**
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***AMICUS* BRIEF OF FIRSTENERGY SOLUTIONS CORP.**

I. Introduction And Statement Of *Amicus* Interest

Amicus Curiae FirstEnergy Solutions Corp. ("FES") is the owner of the Davis-Besse Nuclear Power Station located east of Toledo, Ohio, and the Perry Nuclear Power Plant located northeast of Cleveland in North Perry, Ohio. Plaintiffs concede in their Motion for Temporary Restraining Order ("TRO") that FES is eligible to receive funds derived from the new "charges" imposed by Amended Substitute House Bill No. 6 ("H.B. 6") on all Ohio retail electric customers. [ECF No. 2, at PageID #41]

On September 4, 2019, FES filed an original action in the Ohio Supreme Court, captioned *FirstEnergy Solutions Corp. v. Ohioans Against Corporate Bailouts*, Case No. 2019-1220 (the "Ohio Supreme Court Action"), challenging Plaintiffs' referendum petition on H.B. 6.[1] The threshold state law issue presently before the Ohio Supreme Court is **whether H.B. 6 is even subject to a referendum under the Ohio Constitution**.

[1] A true and accurate copy of FES' Verified Complaint filed in the Ohio Supreme Court Action is attached as Exhibit 1.

FES submits this *Amicus* Brief in opposition to Plaintiffs' Motion for TRO on two fundamental grounds that may not be covered in the briefing by the parties:

First, under the *Pullman* doctrine and controlling Supreme Court precedent requiring federal courts to avoid unnecessary decisions on constitutional issues where possible, this Court should abstain and defer to the Ohio Supreme Court's adjudication of the threshold legal issue in the Ohio Supreme Court Action. Under Article II, § 1g of the Ohio Constitution, the Ohio Supreme Court has "original, exclusive jurisdiction over all challenges made to [referendum] petitions…." And, a ruling by the Ohio Supreme Court that H.B. 6 is not subject to a referendum would moot (or at least dramatically alter) all of the claims and issues in this case.

Second, the Court should be apprised of the fact that Plaintiff Brandon Lynaugh has previously provided testimony both to this Court and the Ohio Supreme Court that directly contradicts the evidence presented by Plaintiffs in this case and their espoused basis for injunctive relief. Here are three key examples:

(1) In 2014, Plaintiff Lynaugh provided sworn testimony to the Ohio Supreme Court that the paid circulator disclosure requirement under Ohio Rev. Code § 3501.38(E)(1) – which requires more disclosure than what is required in the Form 15s under Ohio Rev. Code § 3501.381 – was "a **simple and easy disclosure** that has **never proved to be an impediment** to our petition efforts." [Ex. 2, Lynaugh Affidavit at ¶ 17 (emphasis added)] But now, Plaintiff Lynaugh would have this Court believe that a less burdensome disclosure requirement in the Form 15s imposes such an "undue burden" that it supposedly violates Plaintiffs' First Amendment rights. [Pltfs' Motion for TRO, ECF No. 2 at PageID# 35]

(2) In 2014, Plaintiff Lynaugh testified to this Court that there was **no ambiguity** in the petition-gathering industry about who was required to file a Form 15 and what disclosure is

required. [Ex. 3, Lynaugh Testimony, 9/19/14 Tr. 4504:4-16] But now, Plaintiff Lynaugh would have this Court believe that the Form 15s and Ohio Rev. Code § 3501.381 do not provide a sufficient "level of clarity and precision" in order to comply with the First Amendment. [ECF 2 at PageID# 35]

(3) In 2014, Plaintiff Lynaugh testified to both this Court and the Ohio Supreme Court about the importance of Ohio's statutory disclosure requirements for paid circulators of statewide issue petitions in order to police rampant fraud by paid circulators, who are incentivized to forge voter's signatures in order to receive more compensation. [Ex. 3, Lynaugh Testimony, 9/19/14 Tr. at 4499-4504, 4516-4517] But now, Plaintiff Lynaugh asks this Court to invalidate the same circulator disclosure requirements that he previously testified are necessary and appropriate for even his firm's own paid circulators to preclude a high risk of fraud.

II. The *Pullman* Doctrine Requires Deferring Adjudication Of Plaintiffs' Constitutional Claims Until Resolution Of The Ohio Supreme Court Action

The Court, under the long-standing abstention doctrine set forth in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), should stay this action pending resolution of the previously filed Ohio Supreme Court Action involving the same parties, which would effectively moot all of Plaintiffs' constitutional claims in this case.

The U.S. Supreme Court holds that under the *Pullman* doctrine: "We have required deferral, causing a federal court to 'stay its hands,' **when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case**." *Growe v. Emison,* 507 U.S. 25, 32 (1993) (emphasis added). *Accord: Harman v. Forssenius*, 380 U.S. 528, 534 (1965) ("Where resolution of the federal constitutional question … may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid … premature constitutional adjudication"); *Brown v. Tidwell,*

169 F.3d 330, 332 (6th Cir. 1999) (*Pullman* abstention was appropriate where "an authoritative decision of the Tennessee courts … would moot the plaintiffs' constitutional claim").

The requirement to abstain under the *Pullman* doctrine is buttressed by this Court's separate "duty … to avoid the unnecessary decision of constitutional questions." *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470 (1945). The Sixth Circuit holds: "[t]he duty to avoid decisions of constitutional questions … [is] based upon the general policy of judicial restraint. Consequently, this court must seek to avoid the constitutional determination … if possible." *Muller Optical Co. v. EEOC*, 743 F.2d 380, 386 (6th Cir. 1984).

Both of these doctrines require the Court to abstain from deciding the constitutional issues in this case because a ruling by the Ohio Supreme Court that H.B. 6 is not subject to a referendum would moot, or materially alter resolution of, the constitutional claims in this case.

Contrary to Plaintiffs' allegations, the right of referendum under the Ohio Constitution does not apply to all state statutory enactments. Rather, the Ohio Constitution plainly states that state tax laws are not subject to a referendum:

> "Laws providing for tax levies … **shall not be subject to the referendum**."
>
> [Ohio Constitution, Article II, § 1d (emphasis added)]

In the Ohio Supreme Court Action, FES maintains that H.B. 6 is such a tax law and, thus, "shall not be subject to the referendum" under this state constitutional exception. Specifically, Section 3706.46 and other parts of H.B. 6 impose a tax (called a monthly "charge") totaling $170 million annually upon all of Ohio's electric customers. Thus, Plaintiffs' pursuit of a statewide referendum asking Ohio electors to invalidate H.B. 6 is illegal and inherently misleading.

The Ohio Supreme Court, in *State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923), dealt with the precise issue of whether legislation imposed a tax levy barring it from referendum under

Article II, § 1d of the Ohio Constitution. H.B. 6 meets every one of the characteristics of a tax levy identified in *Forney*:

- H.B. 6 states the *public purpose* for the tax: "to facilitate and continue the development, production, and use of electricity from nuclear, coal, and renewable energy sources in this state." [H.B. 6, Introductory Paragraph]

- H.B. 6 *designates the persons from whom the tax is "collect[ed]"*: "all … retail electric customers in this state." [R.C. 3706.46(A)(1)]

- H.B. 6 *fixes the amount of the tax*: "One hundred fifty million dollars annually" plus "Twenty million dollars annually." [R.C. 3706.46(A)(1)]

- H.B. 6 states *when the tax is payable*: "Beginning … January 1, 2021." [R.C. 3706.46(A)(1)]

- H.B. 6 states the *collected moneys* are to be *deposited* "*in the custody of the treasurer of state*." [R.C. 3706.49 and 3706.53]

In fact, Plaintiffs, themselves, admit that H.B. 6 imposes a **"special tax."** Just last week, Plaintiffs twice made the following admission in their advertisements in *The Toledo Blade*:

> SIGNATURE GATHERING/
> POLITICAL ACTIVISM/CUSTOMER SERVICE
>
> Earn $20-$30 an hour! Get Paid Twice per week! $10/hour + $1 for every signature you get on the petition. Be a citizen activist and Earn extra cash now. **The Ohio Nuclear Bailout will add a special tax to your electricity bill.** Help circulate our petition to let voters decide on this corporate welfare raid of Ohioans. This is one month long opportunity, do not miss a single day! To apply, visit us in person with proper legal identification. We can get you working the next day. Toledo office, 1715 Indian Wood Circle Suite 200, Maumee, OH 43537 (near intersection of 475 and I-80/90. Stop by anytime Monday-Saturday 10am-3pm for a 15-30 minute interview. 419-260-2180
>
> [Ex. 4, Plaintiffs' Ads in *The Toledo Blade*, dated 10/3/19 and 10/4/19 (emphasis added)]

Plaintiffs are also utilizing a similar online ad through *The Toledo Blade* website, which concedes that H.B. 6 imposes a "special tax." [Ex. 4, Plaintiffs' online Ad in *The Toledo Blade*, posted 9/29/19 (emphasis added)] This online ad is still being utilized today.

These tax admissions by H.B. 6 opponents are nothing new. The academic expert of the opponents of H.B. 6 vigorously opposed its adoption for the very reason that it imposes a "tax" on all Ohio electric customers:

> "[The] charges [imposed by H.B. 6] are **de facto taxes** because the power of the state is used to extract payments from electricity users…. The Legislature is being asked to **tax** electricity users …."
>
> [Edward W. Hill, Ph.D., OSU Economics Professor, testifying in opposition to H.B. 6 (emphasis added), found at Ex. 1, FES Complaint, Maciaszek Aff'd Ex. B-1]

And, many other opponents of H.B. 6 – including *The Cincinnati Enquirer* – acknowledge it as a "tax" and attacked it for that reason. *See* Exhibit 1, FES Complaint, Maciaszek Affidavit Exs. B-1 to B-10.

In this case, every one of Plaintiffs' constitutional claims is premised upon their supposed right to a referendum on H.B. 6 under the Ohio Constitution. If H.B. 6 is held to be a tax levy by the Ohio Supreme Court, then Plaintiffs have no right to, and cannot seek, a referendum, and there is no basis for them to seek a TRO in this case. Without a right of referendum, there would be no need for Plaintiffs' petition circulators to file Form 15s pursuant to Ohio Rev. Code § 3501.381. There would be no need to gather signatures on a referendum petition. And, there would be no 90-day deadline to file the referendum petition.

In other words, Plaintiffs' constitutional claims and the injunctive relief they seek in this case are rendered moot once the Ohio Supreme Court decides the pending threshold legal issue that H.B. 6 is not subject to referendum pursuant to Article II, § 1d of the Constitution – an issue

over which the Ohio Supreme Court has original, exclusive jurisdiction. Plaintiffs have already filed their answer to FES' complaint in the Ohio Supreme Court Action, so the referendum issue has been joined in that action.

This is precisely the situation for which the *Pullman* doctrine requires this Court to abstain from adjudicating Plaintiffs' constitutional claims until the Ohio Supreme Court decides the threshold referendum issue.

III. Plaintiff Lynaugh's Prior Inconsistent Testimony

Plaintiffs must establish entitlement to an injunction by clear and convincing evidence. *Kendall Holdings, Ltd. v. Eden Cryogenics*, 2014 U.S. Dist. LEXIS 146816, *8 (S.D. Ohio, March 4, 2014) (Sargus, J.). But Plaintiffs cannot meet this evidentiary burden because Plaintiff Brandon Lynaugh has previously provided testimony both to this Court and the Ohio Supreme Court that directly contradicts the evidence presented by Plaintiffs in this case and their supposed basis for injunctive relief.

Plaintiffs contend that the simple disclosure requirement in the Form 15s imposes such an "undue burden" that it violates circulators' First Amendment rights. [Pltfs' Motion for TRO, ECF 2 at PageID# 35] But this contradicts Plaintiff Lynaugh's prior sworn testimony concerning the paid circulator disclosure requirement under Ohio Rev. Code § 3501.38(E)(1), which mandates that, "[o]n the circulator's statement for … a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, and the name and address of **the person employing the circulator** to circulate the petition, if any" (emphasis added). In other words, the paid circulator disclosure requirement under Ohio Rev. Code § 3501.38(E)(1) is more burdensome than the simple disclosure of the circulator's name and address in the Form 15s required under Ohio Rev. Code § 3501.381.

But contrary to Plaintiff Lynaugh's claims here, he previously testified that the more burdensome circulator disclosure requirement under Section 3501.38(E)(1) is "a **simple and easy disclosure** that has **never proved to be an impediment** to our petition efforts." [Ex. 2, Lynaugh Affidavit at ¶ 17 (emphasis added)] Mr. Lynaugh elaborated further on this point in his affidavit:

> 15. Although the form of petition we used in both the Smoke-Less Amendment and Casino Initiative campaigns not only disclose the identity and address of the person employing the paid circulator as required by R.C. 3501.38(E)(1), but also voluntarily disclosed the ultimate source of funding of the petition effort as well, we successfully collected approximately 1,500,000 elector signatures (nearly all of which were collected by paid circulators) without any difficulty attributable to these disclosures.
>
> 16. Based on my personal observation and experience, the paid circulators' disclosure of the name and address of the person employing the circulator did not impair or hinder our campaigns' ability to hire or retain circulators. These disclosures did not result in harassment or retribution against any paid circulator, those employing them, or the ultimate source of our funding. These disclosures also did not impair or hinder our ability to collect signatures from electors.
>
> 17. The disclosure required by R.C. 3501.38(E)(1) of the identity and address of the person employing the paid circulator is a simple and easy disclosure that has never proved to be an impediment to our petition efforts. We always say, "when in doubt, fill it out," and have never found any difficulty complying.
>
> [Ex. 2, Lynaugh Affidavit ¶¶ 15-17]

Plaintiffs also now assert that the Form 15s and Ohio Rev. Code § 3501.381 do not provide a sufficient "level of clarity and precision" in order to comply with the First Amendment. [ECF 2 at PageID# 35] But this contradicts Plaintiff Lynaugh's prior testimony to this Court about the Form 15s.

> Q: Sir, I'd ask you [Lynaugh] to turn in the intervenor exhibit notebook right in front of you that's open to Exhibit 28. Is this, sir, a copy of the form 15 that you personally filed being a

> recipient of compensation for being involved in the smoking [petition] issue that you had described in 2006?
>
> A: Yes.
>
> Q: And did you understand any organization being paid to solicit or organize solicitation of petition signatures was required to file [the form 15]?
>
> A: Yes.
>
> **Q: Was there any ambiguity about that to your knowledge, in the industry?**
>
> **A: No.**
>
> [Ex. 3, 9/19/14 Tr. 4504:4-16 (emphasis added)][2]

Finally, Plaintiffs contend that the Form 15 disclosure requirement for petition circulators is a "content-based regulation" that cannot be justified by an important state interest. This is wrong as a matter of law and is also contradicted by Plaintiff Lynaugh's prior testimony to both this Court and the Ohio Supreme Court.

The Sixth Circuit recently rejected the same "content-based" argument that Plaintiffs are now making. In *Committee to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, 885 F.3d 443 (6th Cir. 2018), the Sixth Circuit held that Ohio's "single-subject" rule for initiative petitions was content neutral even though it applied only to persons supporting initiatives. The Court reasoned that single-subject requirement "applies to all initiative petitions, no matter the topic discussed or idea or message expressed. It may be justified without reference to the content of any initiative petitions." *Id.* at 447. This Sixth Circuit holding applies equally to the Form 15 requirement under Ohio Rev. Code § 3501.381, which applies to all statewide initiative and referendum petitions, "no matter the topic discussed or idea or message expressed."

[2] Mr. Lynaugh provided this testimony in *Libertarian Party of Ohio v. Husted, Ohio Secretary of State*, Case No. 2:13-cv-953 (S.D. Ohio) (Watson, J.).

Plaintiffs fail to cite a single case holding that disclosure requirements for those managing or even supporting a statewide initiative or referendum petition, regardless of the topic or content, are nevertheless content-based regulations.

As for the facts, Plaintiff Lynaugh, himself, has twice testified about the importance of Ohio's statutory disclosure requirements for paid circulators of statewide issue petitions in order to police rampant fraud by paid circulators. [Ex. 3, Lynaugh Testimony, 9/19/14 Tr. at 4499-4504, 4516-4517] [Ex. 2, Lynaugh Affidavit at ¶¶ 4-10] In Mr. Lynaugh's own words:

> Fraud is encouraged by the financial incentive for paid circulators to produce as many signatures as possible, in the shortest time possible, since the number of signatures produced is the basis for their compensation. The talent pool from which paid circulators is drawn consists primarily of people who do not otherwise have regular employment, so the economic incentive to falsify signatures is particularly strong among paid circulators.
>
> [Ex. 2, Lynaugh Affidavit, dated March 19, 2014, at ¶ 6]

Mr. Lynaugh further testified that "the paid circulators' temptation to cheat is disproportionately great as compared to volunteer circulators," who are motivated to obtain valid signatures to assure that the candidate or issue that they support actually makes it on the ballot. [Ex. 2, Lynaugh Affidavit ¶ 10] In fact, Mr. Lynaugh is unaware of any instance in which a volunteer circulator committed fraud and describes the difference of risk between volunteer fraud and paid circulator fraud as "night and day." [Ex. 3, 9/19/14 Tr. at 4516-17]

Mr. Lynaugh provided even more detailed testimony to this Court about paid circulator fraud. As of 2014, his firm had been responsible for collecting petition signatures on two statewide petition issues. He testified that, in both of those efforts, they experienced several instances of fraud by their paid circulators (in contrast to their volunteer circulators):

> Q: … Sir, in conducting those two statewide petition efforts with paid solicitors did you encounter any problems with cheating by the paid circulators?
>
> A: We did. In both of those efforts, in 2006 we had several circulators that committed fraud. Towards the end of the campaign we hired some temporary workers and they particularly had issues. I remember taking several calls from county sheriffs and county prosecutors in turning over training materials that we had provided the circulators to help with their prosecution ….
>
> So we did have, I recall, several circulators in the '09 effort that after the fact still had to deal with prosecution. In fact, we had to fire one of our field effort – essentially a petition firm that was doing voter registration because towards the tail end of the campaign in '09 they were discovered to be – their actual circulators that were doing voter registration were discovered to be committing fraud. So it's something that in our industry it's something we have to spend a lot of time focused on because there is an incentive, a financial incentive to commit fraud.
>
> [Ex. 3, 9/19/14 Tr. 4499:1 to 4500:20]

Mr. Lynaugh even testified that, as recently as 2013 or 2014, he witnessed paid circulators actually going through phone books to obtain voter names and addresses in order to forge their signatures on issue petitions:

> Literally, a circulator instead of spending the afternoon on a street corner, would go through a phone book and just forge signatures and addresses right out of a phone book. We actually witnessed some of that this past year ….
>
> [Ex. 3, 9/19/14 Tr. 4501:6-10]

Plaintiffs fail to present clear and convincing evidence supporting the issuance of a TRO where, as here, the declarant who submits evidence in support of the motion has provided prior sworn testimony that directly contradicts Plaintiffs' own evidence.

IV. Conclusion

For these reasons, *Amicus Curiae* FirstEnergy Solutions Corp. urges the Court to deny Plaintiffs' motion for a TRO and to abstain from adjudicating Plaintiffs' constitutional claims until the Ohio Supreme Court decides the threshold state law question of whether H.B. 6 is even subject to a referendum under the Ohio Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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